Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-569

In the Supreme Court of the United States
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC.

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STATEMENT OF FACTS

A complete statement of the facts in the record is contained in Petitioner's Brief. Nevertheless, Burlington is compelled to supplement that statement due to the serious mischaracterizations of the record contained in the briefs of Respondent, Kimberly Ellerth, and her *amici*.

First, Ellerth incorrectly states in her brief that she reported the alleged harassment of her supervisor, Ted Slowik, to Burlington management, stating: "During her fourteen months at Burlington, Ellerth complained about Slowik's sexual harassment to a number of managerial and non-managerial employees." Resp. Br.[1] 5. This statement contradicts Ellerth's sworn testimony in this case, in which she unequivocally stated that despite her knowledge of Burlington's policy against sexual harassment, which provides three avenues for complaint, she never reported Slowik's alleged conduct to anyone in authority. Her representations to the contrary are a gross distortion of the record.

Specifically, Ellerth testified as follows:

Q. . . . In any event, you chose not to do that, correct?

A. Chose not to do what?

Q. To report the conduct of Ted Slowik.

A. Correct.

Q. To anyone in authority.

A. Correct.

* * *

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[1] Citations to "Resp. Br" shall refer to the Brief for Respondent.

Q. You never told anyone in human resources about it, did you?

A. No, I did not.

J.A. 112-13. Ellerth also testified that she did not inform her direct supervisor of the alleged harassment because, as she testified at deposition, "it would be his duty as my supervisor to report any incidents of sexual harassment." J.A. 110-11. Moreover, Ellerth testified that none of the Burlington employees whom she allegedly told of Slowik's harassment were her supervisors or in authority at the company. J.A. 104-09.

Second, Ellerth and several of her *amici* state or imply that Ellerth was constructively discharged as a result of her failure to "submit" to Slowik's alleged harassment. Resp. Br. 4-5, 7, 11.[2] Ellerth ignores the record below and the reasons which she herself gave for her resignation at the time. On the day she quit, Ellerth faxed a letter to her supervisor reciting a litany of reasons for her resignation, including a lack of proper training, lack of support from Ellerth's co-workers, her supervisor's failure to provide positive feedback, "nit picking" and "whining" customers and a "standing offer from a well-known company." J.A. 10-14.[3]

Based on this and other evidence in the record, including Ellerth's failure to report the alleged harassment, the district

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[2] *See also* Brief *Amicus Curiae* of the National Employment Lawyers Association in Support of Respondent at 7 ("[Respondent] was constructively discharged, [and] her promotion was delayed").

[3] Ellerth claims that she and her husband deleted brief references to Slowik's alleged conduct from this letter before sending it to her supervisor and concedes that her supervisor never saw these redacted passages. J.A. 100-03.

court concluded, "Ellerth consciously chose not to use Burlington's grievance procedure; therefore it cannot be said that Burlington made Ellerth's working conditions intolerable forcing her into an involuntary resignation. Plainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." Pet. App. 286a. This ruling was not disturbed by the Seventh Circuit on appeal. Thus, it is the law of this case that Ellerth was *not* constructively discharged as a result of Slowik's alleged conduct. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

Third, Ellerth's allegation, which was formalized in a chart, that Slowik committed 139 separate acts of sexual harassment is insupportable. J.A. 162-73. For instance, Ellerth claims that at a lunch in the summer of 1993, Slowik made "about" 20 off-color jokes, none of which she can specifically remember. J.A. 23-27. This accounts for 20 of Ellerth's 139 acts of harassment. J.A. 164. As the district court observed, "the chart must be taken with a very large grain of salt" for this very reason. Pet. App. 261a, n.8.

Fourth, Ellerth claims that a genuine issue of fact exists because Burlington did not offer evidence below regarding, *inter alia*, how it investigates sexual harassment complaints, how it had remediated past harassment allegations or what "safeguards" were in place to protect Ellerth from reprisal. Resp. Br. 32-33. This argument is absurd. There is no dispute that Burlington had a sexual harassment policy in place. J.A. 113. Ellerth presented no evidence at the summary judgment stage that Burlington did not enforce this policy or that Burlington ever retaliated against any employee who reported sexual harassment. Burlington had no

obligation to present evidence of facts which were undisputed at the summary judgment stage.[4]

Finally, Ellerth has mischaracterized the district court's ruling that it could consider alleged harassment occurring prior to December 20, 1993. Resp. Br. 3 n.4. The district court in fact held that these alleged acts, including Slowik's alleged statement to Ellerth that he could make her life "very hard or very easy" and numerous other acts, were time-barred and could not form the basis of Ellerth's claims. Pet. App. 261a. The portion of the district court's opinion cited by Ellerth only refers to the issue of whether Slowik's time-barred conduct could be considered in determining whether the conduct was sufficiently "severe and pervasive" to constitute a hostile work environment, which is no longer at issue in this case. Pet. App. 262a-263a. These comments have no relevance to Burlington's liability for *quid pro quo* harassment, nor did the district court hold that they do.

ARGUMENT

The question presented to the Court is whether an employer is strictly liable for a supervisor's "quid pro quo" type threats where the employee has suffered no tangible job detriment as a result of the refusal to submit to the threats. Burlington recognizes that when the employee can demonstrate that the tangible aspects of her employment were affected by her refusal to submit to "quid pro quo" type threats, a strict liability standard applies; but when the employee has suffered no tangible job detriment, as in this case, the employer's liability should be judged under a negligence standard. Under this standard, where an employer

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[4] Moreover, Ellerth admitted that not reporting Slowik's conduct was a decision that she and her husband made independently of anything that occurred at Burlington. J.A. 115.

has an enforced sexual harassment policy and the employee knows of the policy and does not report the harassment to the company, the employer cannot be held liable unless it knew or should have known of the harassment.

Ellerth and her *amici* ask this Court to discard over twenty-five years of Title VII jurisprudence and create a new rule, unique to sexual harassment claims, which would hold employers strictly liable for *all* acts of sexual harassment committed by a supervisory employee, regardless of whether tangible aspects of employment are affected. Ellerth's position ignores the well-settled distinction that has been consistently recognized in employment discrimination cases between discrimination which causes a tangible job detriment and that which does not, is inconsistent with this Court's prior decisions and misconceives the application of agency principles under both common law and 42 U.S.C. § 1983.[5]

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[5] Although traditional Title VII analysis in harassment cases focuses on application of common law agency principles, this Court has wisely instructed in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), that courts should "look to agency principles for guidance" in the area of sexual harassment law, rather than mechanically applying those principles, implicitly recognizing the distinctions between sexual harassment and other forms of discrimination. Standards of employer liability in this area are best formulated by analogizing to agency principles applied in employment discrimination law generally to arrive at a fair and reasonable rule appropriate to the circumstances of sexual harassment cases.

I. STRICT LIABILITY SHOULD NOT BE APPLIED UNDER TITLE VII WHERE THE EMPLOYEE HAS SUFFERED NO TANGIBLE JOB DETRIMENT

A. Applying a Negligence Standard Where No Tangible Job Detriment Has Occurred is Consistent with this Court's Decision in *Meritor* and With the Distinctions Observed by a Majority of the Circuit Courts

Both this Court and the circuit courts of appeals have recognized that strict liability applies only to Title VII actions where an employee has suffered a tangible job detriment as a result of discrimination. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court held that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination," and therefore prohibits sexual harassment which "has created a hostile or abusive working environment." 477 U.S. at 64, 67. However, this Court also cautioned that the strict liability rules which govern employer liability for "tangible" discrimination did not necessarily apply to sexual harassment claims where the tangible aspects of employment had not been affected. 477 U.S. at 72. This Court observed that the language of Title VII which defines "employer" to include any "agent" of an employer "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable." *Id.* Thus, this Court held that the Court of Appeals erred in concluding "that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known of the misconduct." *Id.*

The circuit courts of appeals have uniformly recognized a distinction between "*quid pro quo*" sexual harassment, for which employers may be held strictly liable, and "hostile work environment" sexual harassment, for which the employer is

held to a negligence standard. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 509, 513-14 (9th Cir. 1994); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994). A clear majority of the circuits have distinguished *quid pro quo* harassment from hostile work environment harassment by focusing on whether the employee has suffered a tangible job detriment as a result of the harassment. *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir.), *cert. denied*, 116 S.Ct. 569 (1995); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Spencer v. General Electric Co.*, 894 F.2d 651, 658 (4th Cir. 1990); *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987).

This categorization of sexual harassment claims into *quid pro quo* and hostile work environment harassment is necessary to preserve *Meritor*'s edict that employers not be held "absolutely liable" for all sexual harassment committed by supervisory employees. Determining the standard of employer liability according to whether the employee has suffered a tangible job detriment recognizes that Congress did not intend for Title VII to remedy all indignities which may occur in the workplace. *See, e.g., Harris v. Forklift Systems, Inc.*, 507 U.S. 17, 21 (1993) (utterance of a single offensive epithet does not violate Title VII); *Patel v. Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (Title VII does not cover employee's allegations that her supervisor required her to retype and rewrite letters and faxes and to submit a monthly typing practice schedule, denied her permission to retrieve a folder from his office and reprimanded her in front of others).

Under the distinction observed by a majority of the circuit courts, and which Burlington asks this Court to adopt, employers are absolutely responsible under the law for discrimination which affects tangible benefits which employees receive, such as discrimination in hiring, firing, promotion and pay. Employers are responsible for "non-tangible" discrimination which nonetheless affects the "terms and conditions" of employment only if the employer knows or should know of the condition and fails to take prompt remedial action or is otherwise negligent.[6]

Thus, by arguing that this Court should apply strict liability to all harassment by supervisory employees, Ellerth and *amici* urge this Court to overturn *Meritor*, which specifically rejected such a standard of employer liability. Ellerth and *amici* also seek to abolish the distinction which the circuit courts have developed over more than twenty-five years of jurisprudence between *quid pro quo* and hostile work environment in favor of a standard which none of the circuit courts have deemed fit to apply under Title VII.

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[6] Contrary to the assertions of Ellerth and her *amici*, Burlington does not propose that employees be *required* to report all harassment which does not rise to a *quid pro quo*. The negligence standard can be satisfied, for example, if the employer fails to promulgate or enforce a sexual harassment policy or knows of the supervisor's history of sexual harassment, even if the employer is unaware of the specific acts of harassment alleged. For this reason, the standard proposed by Burlington is not comparable to the proposed amendment to the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, described in Ellerth's brief.

B. Limiting Strict Liability to Situations Where Employees Have Suffered A Tangible Job Detriment Comports With the Standards Applied to Other Forms of Discrimination Prohibited by Federal Law

The same distinction between discrimination affecting tangible aspects of employment, for which an employer may be held strictly liable, and "non-tangible" discrimination, for which an employer may be liable only if it knows of the harassment and fails to remedy it, is observed throughout federal employment discrimination law. In the area of race discrimination, for example, the courts of appeal have uniformly ruled that a case of racial harassment[7] under Title VII or 42 U.S.C. § 1981 cannot be established merely by showing that the employee was subjected to racial slurs or other hostility sufficiently severe and pervasive to affect the terms and conditions of employment. Rather, an employer is liable for racial harassment only if the employer knew or should have known of the harassment and failed to take prompt and remedial action in response. *Ward v. Bechtel Corp.*, 102 F.3d 199, 202-03 (5th Cir. 1997); *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995); *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 259 (8th Cir.), *cert. denied*, 516 U.S. 830 (1995); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 481-83 (6th Cir. 1989).

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[7] Racial harassment is, by definition, discrimination which does not cause tangible job detriment but "significantly and adversely affects the psychological well-being of an employee because of his or her race." *Gilbert v. City of Little Rock, Arkansas*, 722 F.2d 1390, 1394 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

A negligence standard is applied even where the racial harassment was allegedly committed by a supervisor. *See Dennis*, 55 F.3d at 153 ("We conclude that where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action"); *Willis v. Ray Sumlin Constr. Co.*, 68 Fair Empl. Prac. Cas. (BNA) 1451, 1454-55 (N.D. Ala. 1995) ("Section 1981 imposes liability on corporations which are, or should be, aware that their work environment is hostile but take ineffective or no corrective action. It is not, as [plaintiff] construes it, a corporate guarantee that a hostile work environment shall not exist at the company. Nor does it require an employer to be aware, at all times, of all the actions of its employees.").

Likewise, employers are not liable for workplace harassment which is based upon other protected characteristics, such as religion or national origin, unless the employer knew or should have known of the harassment, even where the alleged harasser is a supervisor. *See, e.g., Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F.3d 1126, 1130 (4th Cir. 1995) ("Liability [for national origin harassment] may be imputed to the employer if the employer had actual or constructive knowledge of the existence of a hostile working environment and took no prompt or remedial action"); *Sarin v. Raytheon Co.*, 905 F. Supp. 49, 52 (D. Mass. 1995) (plaintiff in national origin and religious harassment case must make a showing that "the employer knew or should have known of the [harassing] conduct").

Hence, the strict liability rule which Ellerth and her *amici* ask this Court to apply to supervisor sexual harassment cases is at odds with the standards of employer liability existing under Title VII generally, as well as with *Meritor* and

prevailing sexual harassment law. Ellerth and *amici* apparently intend either to create a special rule of employer liability for sexual harassment cases or to turn Title VII into a "corporate guarantee" of equal treatment in all aspects of employment, tangible and non-tangible, making employers responsible for every act and every comment of their supervisory employees. Neither approach can be justified under *Meritor* or the language of Title VII.

A rule of strict liability for all supervisor conduct is ill-advised for the additional reason that it will create an impossible burden on employers to monitor their supervisory employees. Employers who may have thousands of supervisory employees (and even those who have but a few) cannot be reasonably expected to control all interactions between them and subordinate employees, both within the workplace and other work-related venues, such as conventions and trade shows, and in places where employees congregate, such as bars and restaurants. Nor can employers police personal relationships that develop between employees to ensure that these relationships are consensual. The only methods available to employers to prevent all supervisor harassment would be incredibly invasive of employee privacy (such as eavesdropping on telephone conversations and E-mail or regulating workplace romances) and interfere substantially with productivity. As the authorities cited above demonstrate, in every other area of discrimination law, courts have recognized that the strict liability standard which Ellerth and *amici* urge places unreasonable burdens on employers and is therefore inappropriate.

C. Neither Common Law Agency Principles Nor the Agency Principles Applied to Section 1983 Claims Justify Holding Employers Liable for All Acts of Supervisors or for *Quid Pro Quo* Type Threats

The position advanced by Ellerth and her *amici* that employers should be strictly liable under Title VII for all actions of their supervisory employees because a supervisor acts for the employer at all times and in all circumstances in which the supervisor's authority is implicated has absolutely no support in either common law agency principles or, as Ellerth contends, in this Court's decisions under 42 U.S.C. § 1983. Nor do these sources of law justify imposing strict liability on employers under the circumstances of this case.

1. Strict Liability is Not Warranted Under the Principles of the *Restatement (Second) of Agency*

Ellerth concedes that most of the traditional common law grounds for finding a principal vicariously liable for the acts of its agent are inapplicable to sexual harassment of employees by supervisors. As Ellerth states, "[F]ew if any companies give supervisors apparent authority to discriminate, and a supervisor who acted out of simple animus toward women . . . could not readily be said to be acting to advance the interests of his employer and thus to be acting within the scope of his employment." Resp. Br. 16.

Ellerth nonetheless premises employer liability for supervisor sexual harassment on *Restatement (Second) of Agency* § 219(2)(d), which provides in part that an employer may be liable for actions outside the scope of employment if an employee is "aided in accomplishing the tort by the existence of the agency relation." The defect in this reasoning is that courts have interpreted Section 219(d)(2) as referring

to conduct by the employee which seems "regular on its face," and thereby induces a reasonable belief in another that the employee is acting under the employer's authority. *See Smith v. Metropolitan School Dist., Perry Township*, 128 F.3d 1014, 1029 (7th Cir. 1997) (cert. petition filed March 16, 1998). Such is rarely, if ever, the case in the context of supervisor sexual harassment.

Here, for example, Ellerth knew that Slowik's alleged conduct violated Burlington's policy against sexual harassment and therefore could not have reasonably believed that his conduct was an official action of Burlington. Indeed, where an employer has an anti-sexual harassment policy and the employee is aware of that policy, the employee cannot reasonably believe that the harasser acts under the employer's authority. *See, e.g., Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994).[8]

Amici the United States and the Equal Employment Opportunity Commission (the "EEOC") argue that threats of adverse job consequences, such as those which Ellerth alleges that Slowik made here, are as much within the scope of a supervisor's employment as is the hiring and firing of employees "because the employer's delegation of authority

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[8] Ellerth erroneously states in her brief that employer liability for discrimination in hiring, firing and other tangible aspects of employment is based upon Section 219(2)(d). In fact, such liability arises under Section 219(1) of the *Restatement (Second) of Agency*, which applies to actions within the scope of the supervisor's employment. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1983). As discussed *supra*, mere threats of adverse job consequences and other intangible forms of discrimination are not within the scope of the supervisor's authority.

makes the injury suffered by the victim possible." Therefore, the EEOC contends, where those threats are linked to sexual propositions, employers are liable under Section 219(1) of the *Restatement*.

The EEOC's argument relies upon an obviously overbroad definition of "scope of employment." Acts such as hiring, firing or promotion of employees are necessarily within the scope of a supervisor's employment because these acts affect the tangible aspects of the employment relationship with that employee. Even if the employer does not endorse the supervisor's discriminatory motive, the supervisor has undeniably wielded the authority entrusted to him by the employer, and the employer may be liable. On the other hand, a supervisor's mere utterance of words to an employee, such as when a supervisor makes a "*quid pro quo*" threat, cannot be an exercise of the supervisor's authority. Unless the threat is carried out, the employer has not acted through its supervisor and the tangible aspects of the employment relationship have not been affected.

Indeed, where a supervisor threatens adverse job action to solely satisfy his personal pleasure, but does not follow through on those threats, the supervisor's conduct is clearly not within the scope of employment. Although the employee may be intimidated, humiliated or degraded by the conduct, the employee's status with the employer has not been changed by the supervisor's conduct.[9] The supervisor has acted completely for his own purposes of obtaining sexual

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[9] Ellerth and her *amici* devote substantial effort to demonstrating that unfulfilled threats can cause emotional harm to victims of harassment. Burlington has never denied that such conduct can cause harm and that an employer may be liable *if* the employer knew or should have known of the conduct which caused the harm. However, under no area of the law is the rule of vicarious liability determined by the extent of a plaintiff's damages.

gratification and, in point of fact, has impeded the purposes of the employer. Such conduct is not within the scope of the supervisor's employment, and liability therefore does not lie under Section 219 of the *Restatement*.

Interestingly, the EEOC has taken a position in this case which seems to be in contrast to the position which it took before this Court in *Meritor*. There, the EEOC defined *quid pro quo* sexual harassment as "harassment which affects *tangible job benefits* and is manifested in a supervisory employment decision." Brief for the United States and the Equal Opportunity Employment Commission in *Meritor Savings Bank, FSB v. Vinson*, No. 84-1979 [hereinafter "EEOC *Meritor* Br."] at 23. The EEOC stated that to impute the sexually harassing actions of a supervisor "automatically and strictly to the employer -- as is appropriate in 'quid pro quo' cases -- is not only doctrinally unwarranted by principles of agency law but practically unfair to the employer . . . ." EEOC *Meritor* Br. at 25. Thus, the EEOC's argument that supervisor conduct which does not affect tangible job benefits is nonetheless within the scope of the supervisor's employment is not only contrary to the *Restatement* but to the EEOC's own position in *Meritor*.

The EEOC argues that "*quid pro quo*" threats and other sexual harassment which do not result in tangible job detriment is nonetheless *quid pro quo* harassment under the

EEOC's own guidelines.[10] The relevant section of those guidelines reads as follows:

Sec. 1604.11 Sexual harassment.

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a).

The EEOC's position in this case is that both subsections (1) and (2) constitute *quid pro quo* sexual harassment. However, nowhere in those Guidelines does the EEOC state that, in subparts (1) *and* (2), it is defining *quid pro quo* harassment. Rather, the Policy Guidance On Current Issues

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[10] This Court has held that because Congress did not confer upon the EEOC authority to promulgate rules and regulations under Title VII, "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Where, as here, the guideline in question was not issued contemporaneously with the enactment of Title VII, it is entitled to even less deference. *Gilbert*, 429 U.S. at 142.

Of Sexual Harassment, dated March 19, 1990, published by the EEOC after its Guidelines were issued in 1980 and its most recent pronouncement, specifically defines *quid pro quo* harassment as occurring only under subpart (2).[11] The Guidelines state that "[*q*]*uid pro quo* harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," and cite 29 C.F.R. Sec. 1604.11(a)**(2)** [emphasis added]. *Id*. Thus, the EEOC has created shifting definitions in that it has taken inconsistent positions before this Court on what standard of liability should be applied to sexual harassment and its own publications offer inconsistent definitions of *quid pro quo* harassment.[12]

2. Municipalities Are Not Strictly Liable for Their Agents' Conduct Under 42 U.S.C. § 1983

Ellerth also extensively contends that Congress intended to incorporate into Title VII the vicarious liability principles promulgated by this Court under the Reconstruction-era civil rights statutes, in particular 42 U.S.C. § 1983. However, the agency principles which this Court has adopted under Section 1983 are directly contrary to those which Ellerth and her *amici* advance in this case.

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[11] The EEOC's Policy Guidance on Sexual Harassment is intended to provide guidance to employers on compliance with Title VII. The Policy Guidance states that it "will remain in effect until rescinded or superseded."

[12] As this Court stated in *Gilbert*, "We have declined to follow administrative guidelines in the past when they conflicted with earlier pronouncements of the agency." 429 U.S. at 143.

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court unequivocally held that Section 1983 does not "impose liability vicariously on governing bodies solely on the basis of the existence of an employee-employer relationship with a tortfeasor." 436 U.S. at 692. Consequently, this Court held, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694. Through its most recent decisions on the question, this Court has "consistently refused to hold municipalities liable under a theory of *respondent superior*." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382, 1388 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 392 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

The Section 1983 cases cited by Ellerth, including, *inter alia*, *West v. Atkins*, 487 U.S. 42 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), concern only the *individual* liability of government agents for constitutional violations committed in the course of their official duties. These cases do not address the question analogous to that presented in this case, that is, the vicarious liability of these agents' employers for their on-the-job misconduct. Consequently, these authorities do not inform this Court's decision here.[13] Rather, the Court should adopt a standard of vicarious liability in sexual harassment cases which do not involve tangible job detriment comparable to

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[13] For the same reason, the citations of Ellerth and her *amici* to the criminal law of attempt and to Hobbs Act criminal prosecutions are irrelevant to the issue at hand. These cases explore only individual criminal liability for conduct, not the liability of the employer of the perpetrator for the criminal conduct.

that which this Court has adopted in *Monell* and the other cases cited above, limiting an employer's liability to circumstances where the employer knew or should have known of the harassment and failed to remedy it.

II. THE DISTRICT COURT PROPERLY APPLIED A NEGLIGENCE STANDARD TO THIS CASE

There is no evidence in the record that Ellerth suffered any tangible job detriment as a result of Slowik's alleged sexual harassment. On the contrary, Ellerth received a promotion which raised her salary by $4000 and entitled her to an annual bonus after less than a year at Burlington and only two weeks after Slowik allegedly told her that she was not "loose enough." J.A. 123. Consequently, her claim should be analyzed under the negligence standard applicable to hostile work environment claims, under which Burlington may be liable only if it knew or should have known of the harassment and failed to prevent or remedy it.

Ellerth cannot show that Burlington was negligent in failing to prevent Slowik's alleged harassment. Ellerth admitted that Burlington had a policy prohibiting sexual harassment and that she was aware of this policy. J.A. 111-12. There is no evidence in the record that Burlington had any knowledge, actual or constructive, of Slowik's alleged harassment. Ellerth herself never reported the alleged harassment to her supervisor, Burlington's human resources department or anyone in authority at Burlington. J.A. 112-13. As the district court correctly concluded, "In view of Ellerth's acknowledgement of her deliberate failure to utilize the equal employment opportunity procedures outlined in the [employee] handbook, and her failure to take any other measures to notify appropriate Burlington management personnel about her harassment, she has failed to raise a genuine issue of material fact as to whether Burlington knew

or should have known about Slowik's conduct." Pet. App. 273a (footnote omitted).

CONCLUSION

The judgment of the court of appeals on the issue before the Court should be reversed.

Respectfully submitted,

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